Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Petition of the State of Minnesota	)	CC Docket No. 98-1
Acting by and Through the Minnesota	)	
Department of Transportation and the	)	
Minnesota Department of	)	
Administration, for a Declaratory Ruling	)	
Regarding the Effect of Sections 253(a),	)	
(b) and (c) of the Telecommunications	)	
Act of 1996 on an Agreement to Install	)	
Fiber Optic Wholesale Transport	)	
Capacity in State Freeway Rights-of-Way	)	
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"), on behalf of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, hereby submits these Comments in response to the Commission's Public Notice, DA 98-32, released January 9, 1998 pertaining to the above-captioned Petition for Declaratory Ruling (the "Petition") filed by the State of Minnesota. Minnesota is seeking a ruling that an agreement ("Agreement") that would give a single developer ("Developer") exclusive rights to access and place telecommunications facilities in specified rights-of-way is not subject to preemption under Section 253. The Agreement, while having been negotiated and apparently finalized, has not yet been implemented.

Minnesota's Agreement with the Developer has certain provisions that are intended to alleviate concerns over compliance with Section 253.[1] While Minnesota's efforts to address these concerns are laudable, the Minnesota Telephone Association ("MTA") has presented serious issues as to whether the Agreement is consistent with Section 253. Once the record is complete, the Commission should carefully examine MTA's arguments. Specifically, Minnesota's grant to a single Developer of long-term exclusive rights to place fiber optic facilities along its freeways should be reviewed carefully to determine whether it will have the effect of prohibiting other entities from providing telecommunications services along freeway routes contrary to Section 253(a).

In its previous decisions under Section 253, the Commission has placed the burden on the party seeking preemption to show that the state or local action either expressly prohibits or clearly has the effect of prohibiting the provision of telecommunications services.[2] While the party opposing preemption (Minnesota) has filed the Petition in this case, the burden should still be on MTA, as the party seeking preemption,[3] to present all the facts supporting preemption. Although SBC has not reached a definitive conclusion in light of the incomplete record, several aspects of the Agreement deserve careful examination because, even on the currently incomplete record, Minnesota's action appears to satisfy the standard for preemption as actions that clearly

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[1] 47 U.S.C. § 253. Petition at 4, 10, 25-26 and Exhibit 5.

[2] See,e.g., California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253 (d) of the Communications Act of 1934, 12 FCC Rcd 14191 ¶¶ 25, 41 (1997) ("Huntington Park").

[3] Strictly speaking, no one has sought preemption of the Agreement. However, Minnesota filed its Petition to resolve Section 253 objections presented to it by the MTA. Therefore, as a practical matter, once the MTA becomes a party to this proceeding, it will be the party seeking preemption.

have the effect of prohibiting the provision of telecommunications. SBC discusses some of the most troublesome aspects of the Agreement below.

The Commission has described the test for determining whether a statute or other state action "has the effect of prohibiting" the provision of telecommunications services under Section 253(a) as follows:

> whether the [statute] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.[4]

On one hand, one could agree with Minnesota that since "[t]he alternative to single-party exclusive access is no access at all,"[5] Minnesota actually has expanded, rather than restricted, competition in the provision of telecommunications services in the State. However, it does not appear that Minnesota has done so in a manner that will assure that all entities will be able to compete in "a fair and balanced legal and regulatory environment."[6] Instead, Minnesota's action favors a single entity, the Developer, awarded the contract for exclusive access for a minimum period of ten years and perhaps as long as thirty years.[7] The Developer will have a distinct advantage over all other competitors in the facilities-based provision of wholesale fiber optic transport capacity

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[4] Huntington Park, ¶31.

[5] Petition at 8.

[6] Huntington Park, ¶31

[7] Petition at 11; Agreement, § 2.70.

across the State.[8]

First. Other entities may have only one opportunity during the initial ten-year term of the Agreement to place their own fiber optic cables in the freeway rights-of-way.[9] Otherwise, other entities are locked out of the facilities-based market along freeway routes[10] for at least ten years. Unless the construction and business plans of other entities happen to coincide with, or are accelerated to match, those of the Developer, other entities will not have an opportunity to place their own facilities.[11] Further, the Agreement appears to give the Developer certain exclusive rights to develop "optional" routes that it has only a limited obligation to pursue.[12] Thus, the record could ultimately show that the Developer will be able to lock others out of rights-of-way where it does not place any fiber at all. These "restriction[s] on the means or facilities through which

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[8] Minnesota claims that Section 253 is not applicable because the Developer is a "carrier's carrier" furnishing "infrastructure," not telecommunications services. SBC does not agree that Minnesota can escape Section 253 on this basis because the Agreement admittedly requires the Developer to provide wholesale transport capacity, including lit fiber, on a nondiscriminatory basis to other service providers. Petition at 14, 26.

[9] Id. at 18, 26 n. 20 and Exhibit 5.

[10] The market definition for purposes of Section 253 analysis may be broader than fiber facilities along freeways in Minnesota. However, in determining the relevant geographic and service markets, the Commission should consider the potential impact on other service providers whose options for connecting two locations may be materially restricted compared to the options available to the Developer. After all, freeways are usually built between major metropolitan areas.

[11] Also, it is not clear whether the opportunity to collocate will be managed in a fair and open manner to assure that all entities have adequate notice of the Developer's plan to lay fiber. Other more subtle differences appear to exist between the rights granted to the Developer and the subordinate rights that might be granted to other entities. See, e.g., Petition, Exhibit 5, § 5.12 (d), (e), (i), (k), (l), (m). These and other concerns need to be analyzed based on the entire record, including sections or Exhibits of the Agreement that were not attached to the Petition.

[12] Petition, at 12 and n.12

[another entity] is permitted to provide service"[13] along freeway routes alone appear sufficient to find that the competitive environment is not fair and balanced and that the ability of other entities to participate as facilities-based providers is materially impaired.

Second. It is likely that other entities will also be at an unfair cost and operational disadvantage in providing service along the most direct route between certain locations in the State. Aside from the fact that other entities will not have the facilities-based option after the Developer's initial construction, they cannot be assured that sufficient capacity of the type they need will be available from the Developer. The State generally has the right to 20 to 30% of all lit capacity, and it is unclear whether the Agreement would allow the Developer and a few other providers to deplete or reserve the remainder of the capacity.[14] The portions of the Agreement attached to the Petition do not describe in sufficient detail the amount of capacity that the Developer is obligated to install or the process for allocating that capacity in a nondiscriminatory manner to all entities that need it. The consequences of a capacity shortage would be more severe for other providers, who, unlike the Developer, do not have control over the allocation and expansion of capacity.

Third. The Developer will have an unfair advantage because there does not appear to be any upper limit on the rates the Developer can charge for network capacity. The

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[13] Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, CCB Pol. 96-13, Memorandum Opinion and Order, FCC 97-346, released October 1, 1997, ¶ 78.

[14] Petition, Exhibit 5, § 3.3.

Agreement does require generally that rates be nondiscriminatory,[15] but it is not clear that this nondiscrimination requirement will be administered fairly or in a fashion that will prevent self-dealing by the Developer. At a minimum further investigation is warranted. For example, the Developer could design its volume and term discounts to suit its affiliate's requirements. Certainly, one would expect the Developer's affiliate to have the longest term User Agreement[16] available. The Agreement also sheds doubt on the nondiscrimination provision due to its references to a "most favored customers [sic] rates and charges."[17] Aside from the potential unfairness in the application of the nondiscrimination provisions, the Developer may choose to price the wholesale capacity at a higher rate to exclude other purchasers that may wish to compete with its affiliate at the retail level. So long as the retail affiliate is still able to price its retail service at competitive levels, the Developer has an incentive to price its wholesale capacity at unattractively high market rates that maximize the collective profit of the Developer and its affiliates. These profit-maximizing rates would tend to discourage other entities from purchasing capacity on this network, even though it may provide the most direct route between the points that other entities may desire to serve.

For these and other reasons discussed by the Minnesota Telephone Association ("MTA"),[18] SBC submits that a closer examination of the entire record may show that the Agreement satisfies the Commission's Section 253 standard for actions that have the

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[15] Id. at 10-11.

[16] It is not possible to assess the impact of the User Agreement on the Section 253 analysis, as it was not attached to the Petition.

[17] Petition, Exhibit 5, § 3.2 (d).

[18] Petition, Exhibits 1, 3.

effect of prohibiting other entities from providing telecommunications services (especially facilities-based) along freeway routes because there is a serious question as to whether it materially restricts the ability of other entities to compete in a fair and balanced environment.[19] If the Commission ultimately concludes based on a complete record that the Agreement clearly has the effect of prohibiting the provision of telecommunications services in the relevant geographic and service markets, it should be preempted to the extent necessary, unless it is saved by the exception in Subsection 253 (b) or (c).

The record is also incomplete on the issues presented by Subsections 253 (b) and (c). SBC does not believe that Minnesota has presented sufficient information to prove that this method of managing the freeway right-of-way is truly necessary to protect public safety. Minnesota has not shown why other alternatives are not available and equally effective. Other less restrictive alternatives could provide more open and even-handed access to a larger number of facilities-based providers without giving a single entity a long-term advantage.[20] Minnesota should be able to control access by multiple providers without appointing one of them to administer and profit from the provision of access to others. The Commission should consider carefully whether the exclusivity provisions were truly necessary to protect public safety or, more likely, driven by the business interests of the parties to the transaction, including the State's interest in obtaining "free" telecommunications facilities and services.

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[19] While Huntington Park is not directly applicable to the circumstances of this case (Accord, Petition at 19), some of the differences between the two cases weigh in favor of preemption. For example, unlike the Agreement here, the city's agreement with Pacific Bell in Huntington Park was not exclusive. This nonexclusivity was a significant factor in the Commission's decision not to preempt in Huntington Park. Huntington Park, ¶¶34, 37.

[20] See Petition, Exhibit 3, at 11.

MTA argues that Minnesota's program fails the requirements of Subsections 253 (b) and (c) because it does not manage the freeway rights-of-way in a "competitively neutral" manner. [21] As discussed above, SBC shares these concerns regarding the competitive impact of the Agreement and urges the Commission to investigate further whether the "competitive neutrality" requirement in Subsections 253(b) and (c) is satisfied, based on analysis of the entire record. One of the most significant problems with the program is the State's grant of exclusive rights to the Developer to collect fees for the use of the rights-of-way. Any "fair and reasonable compensation [collected] from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way"[22] should go to the state or local government entity, not to a private entity, like the Developer.

The Agreement presents a number of issues that the Commission will need to resolve to make its determination under Section 253. SBC submits that, even on an incomplete record, Minnesota's action appears to satisfy the standard for preemption under Section 253 (d). Of course, if the Commission ultimately concludes that the Section 253 standard for preemption is satisfied, Minnesota's action should be preempted only to the extent that it actually or effectively constitutes a barrier to entry.[23]

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[21] Id. Exhibits 1, 3.

[22] 47 U.S.C. § 253 (c).

[23] Even if the Commission determines that the Agreement as written is not subject to preemption under Section 253, it should acknowledge that it would entertain subsequent petitions under Section 253 regarding implementation of the Agreement. See Huntington Park, ¶38.

Respectfully submitted,

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February 9, 1998

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "COMMENTS OF SBC COMMUNICATIONS INC." in CC Docket No. 98-1 has been filed this 9th day of February, 1998 to the Parties of Record.

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February 9, 1998

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